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IN THE

Supreme Court of the United States

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No. [redacted]

TERM — 1969

LOUIS A. HEYD, JR., Sheriff
Parish of Orleans,
State of Louisiana,

Petitioner,

versus

ROBERT L. BROWN and
WILLIAM J. HADRICK,

Respondents.

RESPONSE TO PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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STATEMENT OF FACTS

On May 26th, 1966, at approximately 2:45 p.m., Officers Justine Favalora, Kenneth Dupaquier and Patrick Lampard, veteran and knowledgeable members of the New Orleans Police Department assigned to the Narcotics Squad, accompanied by Willie Richardson, a known addict, who resided at 3017 1/2 Cherry Street, New Orleans, Louisiana, were enroute to Richardson's home armed with a search warrant to search the hereinabove mentioned residence.

When the Officers' unmarked vehicle was almost in front of the house they noticed an individual named

Robert L. Brown get into an automobile parked in front of 3017 1/2 Cherry Street.

At this time Officer Favalora states (T 285), "There's Brown — that looks like a deal", whereupon Officer Favalora speeds up and the car being driven by Hadrick speeds off.

There is a short chase in which three shots are fired by Officer Lampard. Hadrick, within a block of the origin of the alleged chase, stops his automobile abruptly.

Officer Favalora runs to Hadrick's side of the automobile and forcefully removes him from behind the wheel.

Officer Lampard runs to the side where Brown is seated, and with considerable force removes him from the automobile. A scuffle erupts and Officer Dupaquier assists Officer Lampard in arresting Brown.

At this time Officer Favalora makes the statement, (T 181), "I have it", referring to his finding a lone capsule laying on forward portion of the front seat.

Officer Dupaquier then proceeds to look on the floor board and under the front seat and finds a piece of cellophane. (T 263).

The defendants then are brought to the residence 3017 1/2 Cherry Street, which consisted of three small rooms, and are interrogated.

While the defendants are in the house, the police further search the automobile, once again they look under the front seat, and this time they find a brown bag containing two glass eyedroppers with yellow bulbs attached, one plastic medicine dropper, one bottle cap and one needle holder.

A Motion to Suppress was filed on behalf of the defendants, and the Court upheld the motion as to all evidence except the "clear capsule" containing a white powder, the one found on the front forward sloping seat after the abrupt stop.

ISSUE

The issue presented to this Court on behalf of Hadrick is whether or not he was *intelligently* and *properly* advised of his rights to counsel by these knowledgeable police at the time of his arrest.

The State in its brief on Page 2 implicitly states that the defendants were properly informed of their rights to counsel. They state: "Immediately after arrest, Officers Favalora, Dupaquier, and Lampard informed Brown and Hadrick, who were together at this time, that they did not have to say anything if they did not want to, that they had a right to consult with an attorney before talking to the police, that if they could not afford an attorney, one would be appointed for them prior to any questioning, and that anything they might say could be used in Court against them." (T 146, 153, 159, 161, 175, 201, 214, 219.)

The Honorable Judge Rubin as well as counsel for Defendant Hadrick was not able to find these quotes in the record where the defendant, Hadrick, was warned that he had the right to an attorney in *advance of interrogation*, and if he could not afford one, the Court would appoint one to represent him *prior to being questioned*. The only officer who states the contentions of the State is Officer Dupaquier. However, he erroneously states that it was Sgt. Lampard who informed the defendants of their rights. When Sgt. Lampard took the stand, he testified he did not inform the defendants of this right. (T 178). He testified that it was Officer Favalora who informed them. Counsel for defendant Hadrick asked Sgt. Lampard the following: (T 176).

"Q. It was never explained to them that you know of your own knowledge that they were entitled to have an attorney right then and there present with them, was it?"

"A. By Favolora, No, sir."

The following questions and answers were propounded to Officer Favalora: (T 200).

"Q. Did you tell him he had that right to counsel even though he didn't have the funds to hire him?"

"A. No."

"Q. Did you afford him any opportunity to procure a lawyer?"

"A. No, sir, I did not."

"Q. And your statement to them was that they had a right to counsel?"
"A. Right."
"Q. You didn't explain what that meant any further than that, did you?"
"A. No, sir. That's all I told them."
"Q. Did you tell them they had a right to have an attorney present when you questioned them?"
"A. No, sir, I did not."

There is not one scintilla of evidence that the defendant Hadrick was ever told that he had the right to consult with an attorney prior to being questioned and if he could not afford one, the Court would appoint one to represent him *prior to interrogation.*

The United States Supreme Court in Miranda case reiterated what it stated in the *Carnly v. Cochran, 369, U. S. 506, 516 (1962).*

> "Presuming waiver from a silent record is impossible. The record must show or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not a waiver."

It is important to point out to the Court that although the record does not disclose that the defendant Hadrick was an indigent and the Court had to appoint an attorney for him, the real fact is that I represented the defendant because I knew his father who was, and still

is, a shoeshine man at Loyola University. Counsel's remuneration has been extremely small considering the effort exerted. Actually, this is no matter for concern in this case, and counsel only brings it up because the District Attorney referred to it on Page 11 of her brief to the Louisiana Supreme Court.

Miranda makes no distinction when it comes to the affluence of the defendant. It defines basic rights. These rights must be explained to a defendant in a manner that he understands. This explanation should be different, depending on the intelligence of the accused. The question here is simply, was Hadrick properly advised. Judge Rubin thought not. He was correct.

The defendant, Hadrick, testified that he had a ninth grade education, so in light of the Miranda decision, it was imperative that, because of the defendant's limited education, he be intelligently explained his constitutional rights against self incrimination.

The United States Supreme Court in Miranda on Page 423 stated:

> "In order fully to apprise a person interrogated of the extent of his rights under this system then it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with Counsel would often be

> understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present."

Although the State contended that the defendant Hadrick was properly informed of his right to counsel prior to interrogation, and if he could not afford one, the Court would appoint an attorney to represent him prior to questioning on Page 14 of its brief, they contend, and I quote:

> "The fact that the officers did not in so many words also tell Brown and Hadrick that they could have an attorney present during interrogation is immaterial in the respectful opinion of the State of Louisiana, as the right to the presence of an attorney during interrogation is implicit in, and flows naturally from, the right to be represented by and consult with an attorney prior to being questioned."

The above language may imply the necessary ingredients to comply with the Miranda decision to counsel for defendant. It certainly does not to a Negro with a ninth grade education, who is an indigent and cannot understand the circumstances and environment of the place where the arrest took place nor realize that he has the right to an attorney, and if

he cannot afford one, the Court will appoint one prior to his being questioned.

Officer Favalora testifies that Hadrick was a known addict, yet he had only one arrest and that was a municipal charge of throwing a garbage can cover at a school bus. The defendant, Hadrick, is exactly the type of individual who must be afforded the full protection of the law. He is not a known felon or convicted criminal.

The State in its brief contends that, in the alternative, if Hadrick did not receive the proper instructions before making his statement, it was harmless error. The defense contends it was not harmless error but was a major link in the chain of evidence produced by the State to show guilty knowledge and intent to possess a narcotic. Without the alleged admission of the defendant, Hadrick, there is no testimony showing that the defendant had taken narcotics on the day of his arrest.

Furthermore, the State in its opening statement remarked: (T-125).

> "The State will further offer, introduce and file in evidence, one large manila evidence envelope . . . . two pieces of clear cellophane, two glass eyedroppers with yellow bulbs attached, one plastic medicine dropper, one bottle cap, one needle holder and one brown paper bag."

The Court, prior to the date of trial, heard defendant's Motion to Suppress All the Evidence. The Court sustained this motion to all the evidence except to the clear capsule containing the white powder. The Assistant District Attorney who represented the State at the hearing on the motion to suppress was also the same Assistant who referred to above evidence in his opening statement. He was well aware that this evidence was not admissible, however, he refers to this inadmissible evidence and stated that he would introduce it into evidence. On opening the evidence envelope to produce that which the Court ruled admissible, the State laid before the jury all of the implements in the bag. Some items were testified to be those used to inject drugs. The obvious intent was to convey to the jury the intent to possess the drug. Naturally, the jury had to conclude that on the basis of what they saw, not evidence, mind you, that Hadrick had a reason to be in possession of the pill on the front seat.

Counsel for the defense realized that this was a highly prejudicial statement which would prevent the defendant from obtaining a fair and impartial trial and moved for a mistrial. The Court overruled the motion.

In *State vs. Sercovich, 246 La. 503, 165, So.2d 301*, the organ of the Court, Justice Summers stated at Page 305:

> "The defendant's objection to the opening statement as a whole and the particular objections to the quoted portions were overruled

by the trial judge, who instructed the jury not to consider the opening statement as proving anything and to consider only the evidence and the testimony of sworn witnesses who appeared on the stand."

The ruling in the above was that the instruction by the Court at the time the objection was made was timely, however, in the present case, the Court did not instruct the jury until the case was completed. The instructions did not cover the fact of the prejudicial reference to evidence that was not introduced but was clearly exhibited to the jury. A witness testified as to the use this evidence is put to by a narcotics user. Obviously, the jurors had only to put two and two together to come up with an answer highly prejudicial to a defendant charged and convicted with possession of one capsule of heroin.

The case of *State v. Crittenden, 218 La. 333, 49 So2d, 418* the District Attorney in his opening statement to the jury related that he was going to introduce a purported confession, whereupon the defense objected for the reason that the Supreme Court had ruled the confession inadmissible. The Court referred on Page 421 to the per curiam of the trial judge that it was proper for the District Attorney to outline in his opening statement what he expected to prove that when he sought to introduce testimony relating to the statement complained of, he ruled that it should be excluded. He also instructed the jury to disregard any remarks that may have been made by the District Attorney, as far

as they were inconsistent with the evidence that had been introduced.

In the case before this Court the Assistant District Attorney tried to introduce part of the suppressed evidence and the Court on its own motion interrupted the Assistant District Attorney and stated that he had already ruled on that evidence and that it was inadmissible. (T-132).

However, when the State called its first witness, Mr. John Koch, he opened one certain envelope over the objection of counsel and laid out the items in full view of the jury. These items all of which, except the clear capsule, had been previously ruled inadmissible, remained in full view of the jury all during the testimony of Mr. Koch.

Then again at (T-241) over the objection of counsel, Officer Favalora is qualified as an expert in the field of narcotics. Officer Favalora then proceeds to tell how an individual and more particularly an addict uses heroin. In this narrative he refers to all the items which the Assistant District Attorney referred to in his opening statement and which were subsequently laid out before the jury.

Officer Favalora further testified that he examined Hadrick's arm and it displayed telltale track marks typically found on drug addicts. However, there is not one scintilla of evidence that these track marks were from the recent use of a narcotic or from a narcotic at all.

Therefore, the admission of the defendant, Hadrick, as to using the heroin on the day of the arrest becomes one of the essential elements in proving the guilty knowledge and intent to possess a narcotic. Its admissibility becomes a material factor in the conviction and is not harmless error.

The State contends that the lower Court was in error and that it did not hold a hearing de novo on the issues of fact raised by the application of habeas corpus. Actually, this contention is completely unsound and is contrary to the very cases that they cite in an attempt to support this position. In the case Townsend v. Sain, 372 U. S. 312, 83 Supreme Court 745 the following cited at Page 760:

> "A District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. Ordinarily, such a record — including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents — is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings. See United States ex ref. Jennings. Ragen, 358 U. S. 276, 79 S.Ct. 321, 3 L.Ed.2d 296; Townsend v. Sain, 359, U.S. 64, 70 S.Ct. 655, 3 L.Ed.2d 634. Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must

hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so."

To hold a hearing de novo on the same facts brought out in the State Court record would be out of the ordinary.

CONCLUSION

In view of the foregoing, it is respectfully submitted that Judge Rubin was correct in granting petitioner the relief they requested. The Writ of Certiorari should be denied.

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CERTIFICATE

I hereby certify that a copy of this Brief has been mailed to Mrs. Louise Korns, Assistant District Attorney for the Parish of Orleans, by addressing same to her at her office, District Attorney's Office, 2700 Tulane Avenue, New Orleans, Louisiana, and depositing in the U. S. Mail, postage prepaid. New Orleans, Louisiana, this day of June, 1969.

PHILIP SCHOEN BROOKS